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7 Attorneys for COUNTY OF MONTEREY

8  
9 **UNITED STATES DISTRICT COURT**  
10 **NORTHERN DISTRICT OF CALIFORNIA**  
11 **SAN JOSE DIVISION**

12 DAN MITCHELL, acting for himself and  
others similarly situated,

13 Plaintiffs,

14 v.

15 COUNTY OF MONTEREY,

16 Defendant.  
17 \_\_\_\_\_ /

18 COUNTY OF MONTEREY,

19 Counterclaimants

20 v.

21 DEPUTY SHERIFFS' ASSOCIATION OF  
MONTEREY COUNTY, a labor organization,  
22 and DAN MITCHELL, acting for himself and  
others similarly situated, DAVID A.  
23 ALLRED, JOHN C. BAIRD, JOSEPH  
ANTHONY CHAFFEE, JOHN Di CARLO,  
24 EDWARD DURHAM, DENNIS ENGLISH,  
NELSON GARCIA, RUBEN A. GARCIA,  
25 DUSTIN HEDBERG, ALFRED JIMENEZ,  
TIM KREBS, RICHARD D. MATTHEWS,  
26 BRUCE MAUK, WILLIAM D. NAPPER,  
SHAWN O'CONNOR, DAVID R. RATTON,  
27 (see next page)  
28

**CASE NO.: C08-01166 RS**

**COUNTY OF MONTEREY'S ANSWER  
TO COMPLAINT FOR VIOLATIONS OF  
THE FAIR LABOR STANDARDS ACT  
[29 USC Secs. 201 et seq.]**

**COUNTY OF MONTEREY'S  
COUNTERCLAIMS FOR  
DECLARATORY RELIEF AND FOR  
REIMBURSEMENT OF OVERPAID  
REGULAR WAGES AND FOR  
OVERPAID OVERTIME WAGES**

**DEMAND FOR JURY TRIAL**

1 KENNETH A. RESOR, ROBERT Q.  
2 RODRIGUEZ, MICHAEL R. SHAPIRO, and  
3 GARY WHEELUS and all other Plaintiffs  
who are now or may hereafter be joined in this  
proceeding,

4 Counter-Defendants  
5 \_\_\_\_\_/

6 **ANSWER TO COMPLAINT**

7 Defendant, COUNTY OF MONTEREY, answers the Complaint on file herein, paragraph  
8 by paragraph, as follows:

9 1. Answering paragraph 1, Defendant admits that Plaintiffs have filed their action  
10 alleging violations of the Fair Labor Standards Act, but Defendant completely denies that there is  
11 any legal basis for any of Plaintiffs' claims therein.

12 2. Answering paragraph 2, Defendant admits that the Plaintiffs mentioned in the  
13 complaint are or were employed by the Defendant, but Defendant completely denies the remaining  
14 allegations in paragraph 2.

15 3. Defendant admits the allegations in paragraph 3, except that Defendant has not yet  
16 verified whether Defendant has employed all of the Plaintiffs at all times mentioned in the  
17 Complaint.

18 4. Answering paragraph 4, Defendant lacks sufficient information or belief to know  
19 whether Plaintiffs can appropriately represent any other individuals, and on that basis, denies the  
20 allegations in Paragraph 4.

21 5. Answering paragraph 5, Defendant lacks sufficient information or belief to know  
22 whether Plaintiffs can appropriately represent any other individuals, and on that basis, denies that  
23 particular allegation in Paragraph 5. Defendant completely denies the remaining allegations  
24 therein.

25 6. Answering paragraph 6, Defendant completely denies the allegations therein.

26 7. Answering paragraph 7, Defendant completely denies the allegations therein.

27 8. Answering paragraph 8, Defendant completely denies the allegations therein.  
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1           9.       Answering paragraph 9, Defendant completely denies the allegations therein.  
2           10.       Answering paragraph 10, Defendant completely denies the allegations therein.  
3           11.       Answering paragraph 11, Defendant completely denies the allegations therein.  
4           12.       Answering paragraph 12, Defendant completely denies the allegations therein.  
5           13.       Answering paragraph 13, Defendant lacks sufficient information and belief and on  
6 that basis denies the allegations therein.

7           14.       Answering paragraph 14, Defendant admits the allegations therein, except that  
8 Defendants lack sufficient information and belief to know at this time whether all the Plaintiffs  
9 named or who might be named in this complaint were actually employed by Defendant within the  
10 last three years, and on that basis, Defendant denies that particular allegation.

11          15.       Answering paragraph 15, Defendant admits the allegations therein, except that  
12 under the applicable collective bargaining agreements, Plaintiffs are required to be paid overtime  
13 for all hours actually worked in excess of 8 hours in a day or in excess of the employee's regularly  
14 scheduled work shift, whichever is greater.

15          16.       Defendant completely denies the allegations in paragraph 16.

16          17.       Defendant completely denies the allegations in paragraph 17, and affirmatively  
17 alleges that the pre-shift activities alluded to in paragraph 17 do not require compensation as part  
18 of the work that Plaintiffs who work in the jail perform for Defendant. Specifically, the time spent  
19 by a jail employee walking from the front door of the jail building to the front desk and then to his  
20 or her duty station is not compensable. The amount of time spent by an employee checking the  
21 roster at the front desk to locate his or her work assignment and initial his or her acknowledgment  
22 of it is insignificant, taking less than a minute. The time spent by an employee changing clothes is  
23 exempt by law from consideration as part of compensable work time. Further, changing into the  
24 work uniform takes no more time or special effort than changing into street clothes, it requires  
25 insignificant amounts of time, and at the election of the employee, it can be done at the work site or  
26 at home. The time and effort spent by employees in equipping themselves with a belt and other  
27 tools of the trade – all of which are almost always immediately available to the employee and can  
28

1 be donned simply by buckling the belt around the waist – is likewise insignificant, taking de  
2 minimis time and effort. In addition, some or all of the equipment can be stored by the employee  
3 at home and can be donned by the employee there. The time an employee spends exchanging  
4 information and/or keys at his or her work station with the person whom that employee is relieving  
5 is also insignificant and de minimis. Taken together, all of these activities are de minimis and do  
6 not require compensation.

7 18. Defendant completely denies the allegations in paragraph 18 and affirmatively  
8 alleges that jail employees are required to remain at their duty station only when their replacement  
9 arrives late, and such hold-over employees are then compensated with overtime pay for as long as  
10 necessary, starting with a minimum of 15 minutes' of overtime pay as soon as their replacement is  
11 at least 8 minutes late.

12 19. Defendant completely denies the allegations in paragraph 19, and affirmatively  
13 alleges that the activities alluded to in paragraph 17 for jail employees leaving work after the end  
14 of their shifts do not require compensation as part of the work that Plaintiffs who work in the jail  
15 perform for Defendant. Specifically, all of the activities alluded to in paragraph 19, individually  
16 and taken together, are de minimis and the employees spend insignificant time and effort in  
17 performing these activities. The time spent by the employee exchanging information and/or keys  
18 with his or her replacement is de minimis. The time spent by an employee walking from his or her  
19 duty station to the exit from the building is not compensable. The time spent by the employee  
20 changing clothes is not compensable, and at the employee's election, can be done at home or in the  
21 locker room at work. The uniform worn by the jail employees takes no more time or effort to  
22 change into or out of than ordinary street clothes. The employee can remove all of the jail  
23 equipment merely by unbuckling the belt on which it hangs. Further, the employee has the choice  
24 of removing the equipment at home and storing it there.

25 20. Defendant completely denies the allegations in paragraph 20, and affirmatively  
26 alleges that the pre-shift activities alluded to in paragraph 20 do not require compensation as part  
27 of the work that Plaintiffs who work in the Patrol unit perform for Defendant. All of the activities  
28

alluded to are de minimis and require insignificant amounts of time and effort. All the Patrol employees begin their shift with a roll call in a regularly assigned meeting room in the Sheriff's Department building. The time spent by a Patrol employee walking from the front door of the building to the meeting room, prior to the start of his or shift, is not compensable. The time spent by an employee changing clothes is exempt by law from consideration as part of compensable work time. Further, changing into the Patrol work uniform takes no more time or special effort than changing into street clothes, it requires insignificant amounts of time, and at the election of the employee, it can be done at the work site or at home. The time and effort spent by employees in equipping themselves with a belt and other tools of the trade – all of which are almost always immediately available to the employee and can be donned simply by buckling the belt around the waist – is likewise insignificant, taking de minimis time and effort. In addition, some or all of the equipment can be stored by the employee at home and can be donned by the employee there. Taken together, all of these activities are de minimis, take insignificant amounts of time and effort, and do not require compensation.

21. Answering paragraph 21, Defendant denies that the pre-shift and post-shift activities alluded to by Plaintiffs were and are such an integral and indispensable part of Plaintiff's principal activities as to impose on Defendant a duty of compensation.

22. Answering paragraph 22, Defendant denies that Defendant derived such a significant benefit from Plaintiffs' performance of these pre-shift and post-shift activities as to impose on Defendant a duty of compensation.

23. Answering paragraph 23, Defendant County admits that at all times Defendant County has been aware that Plaintiffs performed the pre-shift and post-shift activities alluded to by Plaintiffs without compensation. Defendant denies that Plaintiffs are or were entitled to compensation for such activities, and Defendant denies that it knew or should have known that Plaintiffs were entitled to such compensation.

24. Defendant completely denies the allegations in paragraph 24, and Defendant affirmatively alleges that the employee organization representing Plaintiffs has negotiated



1 innumerable labor agreements with Defendant without ever claiming that Plaintiffs were entitled  
2 by law to compensation for any of the pre-shift and post-shift activities alluded to by Plaintiffs in  
3 this action and without ever asking for or seeking to negotiate such compensation.

4 25. Defendant completely denies the allegations in paragraph 25.

5 26. Defendant completely denies the allegations in paragraph 26.

6 27. Defendant completely denies the allegations in paragraph 27.

7 28. Defendant completely denies the allegations in paragraph 28.

8 29. Defendant completely denies the allegations in paragraph 29.

9 30. Defendant completely denies the allegations in paragraph 30.

10 31. Defendant completely denies the allegations in paragraph 31.

11 32. Defendant completely denies the allegations in paragraph 32.

12 33. Defendant admits the allegations in paragraph 33.

13 34. Defendant completely denies the allegations in paragraph 34.

14 35. Defendant completely denies the allegations in paragraph 35.

15 36. Defendant completely denies the allegations in paragraph 36.

16 37. Defendant completely denies the allegations in paragraph 37.

17 38. Defendant completely denies the allegations in paragraph 38.

18 39. Defendant completely denies the allegations in paragraph 39.

19 40. Defendant completely denies the allegations in paragraph 40.

20 41. Defendant completely denies the allegations in paragraph 41.

21 ANSWER TO FIRST COUNT

22 CAUSE OF ACTION FOR THE VIOLATION OF  
23 THE FAIR LABOR STANDARDS ACT

24 42. Defendant incorporates herein by reference its above answers to the allegations in  
25 paragraphs 1-41 of the Complaint, as though fully set forth herein.

26 43. Defendant completely denies the allegations in paragraph 43.

27 44. Defendant completely denies the allegations in paragraph 44.

28 45. Answering paragraph 45, Defendant denies that it received such a benefit from

1 Plaintiffs for the pre-shift and post-shift activities alluded to by Plaintiffs as to impose on  
 2 Defendant a duty to compensate Plaintiffs for such activities.

3 46. Answering paragraph 46, Defendant admits that it was aware that Plaintiffs were  
 4 performing pre-shift and post-shift activities, but Defendant denies that such work constituted  
 5 compensable work and Defendant denies that it was aware that such work did, would or might  
 6 constitute compensable work or was claimed by Plaintiffs to constitute compensable work.

7 47. Defendant admits that 29 CFR Sec. 553.221(b) says what it says, and Defendant  
 8 affirmatively alleges that Sec. 553.221(b) states only a small part of the FLSA regulations  
 9 governing compensation. In all other respects, Defendant completely denies the allegations in  
 10 paragraph 47.

11 48. Defendant admits that 29 CFR Sec. 785.47 says what it says, and Defendant  
 12 affirmatively alleges that Sec. 785.47 includes more text than is quoted by Plaintiffs. In all other  
 13 respects, Defendant completely denies the allegations in paragraph 48.

14 49. Defendant admits that 29 CFR Sec. 785.13 says what it says, but otherwise,  
 15 Defendant completely denies the allegations in paragraph 49.

16 50. Defendant completely denies the allegations in paragraph 50.

17 51. Defendant completely denies the allegations in paragraph 51.

18 52. Defendant completely denies the allegations in paragraph 52.

19 53. Defendant completely denies the allegations in paragraph 53.

20 54. Defendant completely denies the allegations in paragraph 54.

21 55. Defendant completely denies the allegations in paragraph 55.

22 56. Defendant completely denies the allegations in paragraph 56.

23 57. Defendant completely denies the allegations in paragraph 57.

#### 24 ANSWER TO SECOND COUNT

#### 25 CAUSE OF ACTION FOR THE VIOLATION OF 26 THE FAIR LABOR STANDARDS ACT

27 58. Defendant incorporates herein by reference its above answers to paragraphs 1-57 of  
 28 the Complaint, as though fully set forth herein.

59. Defendant admits that 29 USC Sec. 207(a)(2)(C) says what it says.

60. Defendant admits that 29 USC Sec. 207(o) and 29 CFR Sec. 553.27 say what they say, but Defendant denies that these provisions impose any of the obligations on Defendant that are asserted by Plaintiffs in their complaint.

61. Defendant admits that 29 USC Sec. 207(e) says what it says, but Defendant denies that this provision imposes any of the obligations on Defendant that are asserted by Plaintiffs in their complaint.

62. Defendant completely denies the allegations in paragraph 62.

63. Defendant admits that the FLSA and corresponding authorities say what they say.

64. Defendant completely denies the allegations in paragraph 64.

65. Defendant completely denies the allegations in paragraph 65.

66. Defendant completely denies the allegations in paragraph 66.

67. Defendant completely denies the allegations in paragraph 67.

68. Defendant completely denies the allegations in paragraph 68.

69. Defendant completely denies the allegations in paragraph 69.

70. Defendant completely denies the allegations in paragraph 70.

71. Defendant completely denies the allegations in paragraph 71.

72. Defendant completely denies the allegations in paragraph 72.

73. Defendant denies that Plaintiffs are entitled to attorneys' fees under any provision of law.

### **AFFIRMATIVE DEFENSES**

#### **FIRST AFFIRMATIVE DEFENSE**

##### **29 USC Sec. 254**

74. Under 29 USC Sec. 254, Plaintiffs are not entitled to compensation for (1) walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform, and (2) activities which are preliminary to or postliminary to said principal activity or activities. All of the pre-shift and post-shift activities



1 alluded to by Plaintiffs come within these provisions of Sec. 254 and are not required to be  
2 compensated.

3 SECOND AFFIRMATIVE DEFENSE

4 29 USC SEC. 203(o)

5 75. 29 USC Sec. 203(o) states: "Hours Worked. In determining for the purposes of  
6 sections 6 and 7 [29 USCS §§ 206 and 207] the hours for which an employee is employed, there  
7 shall be excluded any time spent in changing clothes or washing at the beginning or end of each  
8 workday which was excluded from measured working time during the week involved by the  
9 express terms of or by custom or practice under a bona fide collective-bargaining agreement  
10 applicable to the particular employee." The pre-shift and post-shift activities alluded to by  
11 Plaintiffs involve changing clothes. Pursuant to a series of collective bargaining agreements  
12 between the Plaintiffs' union, on behalf of the Plaintiffs, and the Defendant, there has been a  
13 consistent and long-term custom and practice of not compensating Plaintiffs for time spent  
14 changing clothes or donning or doffing clothes and equipment. Further, in section 19 of the  
15 Memorandum of Understanding (MOU) between Plaintiffs' union and the Defendant County for  
16 the period July 1, 2001, through June 30, 2006, the parties expressly agreed that Defendant would  
17 pay a uniform allowance to each employee such as Plaintiffs who are required to have and  
18 maintain a uniform. Each newly hired uniformed employee received the amount of \$ 660 for the  
19 purchase of the uniform. Thereafter, after completing the first year of employment, all uniformed  
20 employees received the amount of \$ 55 per month as an ongoing uniform allowance. Sec. 6.4 of  
21 the current MOU between the Plaintiffs' union and Defendant County (for the period July 1, 2006,  
22 through June 30, 2009) now requires an initial payment of \$960 and a monthly uniform allowance  
23 of \$80. These sums adequately compensate Plaintiffs for all aspects of their uniform requirements  
24 and are the only sums that Plaintiffs' union has heretofore bargained for in relation to uniforms for  
25 Plaintiffs.

1                                    THIRD AFFIRMATIVE DEFENSE

2                                    2-YEAR STATUTE OF LIMITATIONS

3            76.        The claims of the Plaintiffs that accrued earlier than two years before the filing of  
4 the Complaint herein or earlier than two years before filing their consent to be joined herein as  
5 Plaintiffs are barred by the applicable two-year statute of limitations under 29 USC Sec. 255(a), as  
6 Defendant has committed no willful violation of the Fair Labor Standards Act.

7                                    FOURTH AFFIRMATIVE DEFENSE

8                                    RELIANCE ON WRITTEN REGULATIONS

9            77.        Each act or omission on the part of Defendant about which Plaintiffs complain  
10 herein was undertaken in good faith and in conformity with and in reliance on a written  
11 administrative regulation, order, ruling, approval or interpretation given by the Administrator of  
12 the Wage and Hour Division of the U.S. Department of Labor [Secretary of Labor] and/or by the  
13 U.S. Secretary of Labor, or on an administrative practice or enforcement policy of said  
14 Administrator, Secretary, or Department of Labor, and the Defendant is therefore immune from  
15 damages in this lawsuit pursuant to 29 USC Sec. 259.

16                                    FIFTH AFFIRMATIVE DEFENSE

17                                    REASONABLE AND GOOD FAITH BELIEF

18            78.        At all times relevant herein, Defendant has acted in good faith and on reasonable  
19 grounds for believing that Defendant had not committed, was not committing, and is not  
20 committing any violation of the Fair Labor Standards Act with respect to any of the acts or  
21 omissions alleged or alluded to by Plaintiffs herein.

22                                    SIXTH AFFIRMATIVE DEFENSE

23                                    29 USC SEC. 207(k)

24            79.        At all times relevant herein, Defendant has adopted, for some or all of Plaintiffs  
25 herein, a plan under 29 USC Sec. 207(k), which permits Defendant to establish shifts that are  
26 longer than 8 hours in a day without incurring overtime obligations. The shifts established by  
27 Defendant that exceed 8 hours in length, as applied to any of the Plaintiffs herein, are consistent  
28

1 with Sec. 207(k) requirements and with the regulations thereunder set forth in 29 CFR Sec.  
2 553.201. Plaintiffs are law enforcement personnel within the definition in 29 CFR Sec. 553. 211.

3 SEVENTH AFFIRMATIVE DEFENSE

4 OFFSET FOR EXCESS BASE WAGES PAID

5 80. Defendant is entitled to an offset for overpayments in wages that Defendant has  
6 paid to Plaintiffs. In paragraph 5.3 of the Memorandum of Understanding between Plaintiffs'  
7 union and Defendant County for the period July 1, 2001, through June 30, 2006, the parties agreed  
8 that wages set for Plaintiffs would be calculated from a benchmark wage established by averaging  
9 the wages for specified positions in three city police departments, including the City of Salinas.  
10 Subsequently, Defendant obtained what it thought were the relevant wages from the three cities,  
11 calculated the wages for Plaintiffs based on the figures provided by the cities, and paid wages to  
12 Plaintiffs based on those calculations. Later still, Defendant learned that the City of Salinas had  
13 provided figures that were incorrectly stated too high, causing the average of the three cities' wages  
14 to be incorrectly high. The Defendant has thus paid wages to Plaintiffs based on the incorrectly  
15 high figures. The mistake was caused by the City of Salinas, Defendant was unaware that the  
16 initially provided figure was erroneous, and Defendant was entitled to rely on the figure provided  
17 by Salinas. Under the MOU presently in effect, Defendant County has continued to pay wages to  
18 Plaintiffs under the incorrectly high calculations. Defendant County is therefore entitled to an  
19 offset against any claim made by Plaintiffs for additional wages, based upon the excess wage  
20 payments made to Plaintiffs because of the erroneous figures provided by Salinas and mistakenly  
21 relied upon in good faith by Defendant County.

22 EIGHTH AFFIRMATIVE DEFENSE

23 OFFSET FOR EXCESS OVERTIME WAGES PAID

24 81. Defendant is entitled to an offset for over payments in overtime wages paid to  
25 Plaintiffs. In counting the hours to reach the threshold where overtime wages must be paid to  
26 Plaintiffs, Defendant has included non-working hours – including but not limited to time spent on  
27 vacation, on sick leave, on compensatory time, and on Workers Compensation leave time.

1           82.     The FLSA requires that the County pay overtime wages only for hours worked after  
2 the employee has actually worked the maximum number of regular hours.

3           83.     Section 14 of the MOU between the County and Plaintiffs' union for the period July  
4 1, 2001, through June 30, 2006, similarly required that the County pay overtime wages only after  
5 the employee had actually worked the maximum number of regular hours.

6           84.     The current MOU also requires that the County pay overtime wages only after the  
7 employee has actually worked the maximum number of regular hours.

8           85.     Nevertheless, the County has in fact paid overtime wages to some or all of Plaintiffs  
9 for work performed by Plaintiffs after counting non-working hours (such as time on vacation, sick  
10 leave, or comp time) to reach the overtime threshold. Defendant has thus paid more than the law  
11 and the applicable MOU's have required for overtime, and Defendant is therefore entitled to an  
12 offset against any claim made by any Plaintiff in this action to the extent that such Plaintiff has  
13 received such excess payments.

14                               NINTH AFFIRMATIVE DEFENSE

15                               OFFSET FOR EXCESS OVERTIME, 29 USC SEC. 207(h)

16           86.     Defendant is entitled to an offset against any claims by Plaintiffs herein to the extent  
17 that Defendant has made overtime payments to any of the Plaintiffs in excess of the statutory  
18 minimum requirements pursuant to 29 USC Sec. 207(h).

19                               TENTH AFFIRMATIVE DEFENSE

20                               INSUBSTANTIAL AND INSIGNIFICANT ACTIVITIES, 29 CFR 785.47

21           87.     Pursuant to 29 CFR Sec. 785.47, the pre-shift and post-shift activities alluded to by  
22 Plaintiff are not required to be recorded and Defendant may disregard the time spent by Plaintiffs  
23 in such activities, because such time is insubstantial or insignificant and cannot as a practical  
24 administrative matter be precisely recorded for payroll purposes. The industrial reality with respect  
25 to such activities is that, on an industry-wide basis, law enforcement agencies routinely and  
26 customarily, under long-standing practices, have not compensated law enforcement employees for  
27 these activities. Typically, other law enforcement agencies as well as Defendant County give their  
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1 employees the choice of whether to change clothes and strap on equipment at home or at work.  
2 The time taken by various employees in performing such activities can vary widely, from a few  
3 seconds or minutes for employees who are focused on completing their preparations for work  
4 quickly, to 10 or 15 minutes or more for employees who mix these activities with socializing or  
5 who proceed in a leisurely manner. The flexibility in the location where these activities can be  
6 performed, the essential ordinariness of the activities involved, and the ease with which they can be  
7 completely quickly or mingled with other distractions make them insubstantial and insignificant.

8 ELEVENTH AFFIRMATIVE DEFENSE

9 WAIVER AND ESTOPPEL

10 88. At all times relevant herein, Plaintiffs and each of them submitted time records to  
11 Defendant without claiming time for the pre-shift and post-shift activities that they allege herein  
12 and Plaintiffs and each of them failed to notify Defendant that they claimed to be entitled to  
13 overtime based on their pre-shift and post-shift activities alleged herein. In addition, over the  
14 years, Plaintiffs' union has negotiated numerous successive labor agreements with Defendant  
15 County over issues relating to compensation and overtime and such agreements have included  
16 provisions relating to uniform allowances above and beyond regular compensation. Nevertheless,  
17 Plaintiffs and their union have not sought to bargain over the issue of compensation for pre-shift  
18 and post-shift activities to be paid at their hourly rate, or the union has not pursued such an issue to  
19 a resolution that led to an agreement on such compensation, even though this issue is clearly within  
20 the scope of bargaining under state and federal law. Plaintiffs knew or should have known that the  
21 issue of compensation for pre-shift and/or post-shift activities was an area that was within the  
22 scope of bargaining and they could have raised it at any time in any of the labor negotiations.

23 89. At all times relevant herein Defendant relied on Plaintiffs' apparent acceptance of  
24 the Defendant's long-standing custom and practice of not compensating Plaintiffs for any of the  
25 pre-shift and post-shift activities alleged or alluded to herein. Defendant was justified in assuming  
26 that Plaintiffs accepted the long-standing custom and practice and in relying on that acceptance.

27 90. Over the years, Defendant has arranged its financial affairs in reliance on Plaintiffs'  
28



1 acceptance of the long-standing custom and practice on this issue. Plaintiffs' sudden assertion, at  
2 this late date, that they are entitled to compensation for pre-shift and post-shift activities has placed  
3 Defendant's financial affairs in jeopardy.

4 91. Plaintiffs are therefore estopped to assert a claim for any monetary recovery based  
5 on the allegations that they are entitled to compensation for pre-shift and post-shift activities, and  
6 Plaintiffs have waived such claims for monetary recovery.

7 TWELFTH AFFIRMATIVE DEFENSE

8 LACK OF STANDING

9 92. Defendant is informed and believes and thereon alleges that some of the Plaintiffs  
10 lack standing to assert the claims alleged.

11 THIRTEENTH AFFIRMATIVE DEFENSE

12 FAILURE TO STATE CLAIM FOR RELIEF

13 93. The Complaint fails to state a claim upon which relief may be granted against  
14 Defendant County.

15 FOURTEENTH AFFIRMATIVE DEFENSE

16 FAILURE TO EXHAUST COLLECTIVE BARGAINING

17 94. Plaintiffs have failed to exhaust their administrative remedies, in that Plaintiffs are  
18 required to present each of the issues raised in their Complaint, to the County in the context of  
19 labor negotiations – both as to the issue of compensation for pre-and post-shift activities and as to  
20 the issue of including the longevity and performance stipend in overtime calculations, as well as to  
21 the issue relating to compensatory time off – before seeking judicial relief.

22 FIFTEENTH AFFIRMATIVE DEFENSE

23 FAILURE TO EXHAUST GRIEVANCE PROCEDURE

24 95. Plaintiffs have failed to exhaust their administrative remedies, in that each of the  
25 issues raised in Plaintiffs' complaint is an issue that, under the current collective bargaining  
26 agreement with the Defendant, Plaintiffs are required to submit to the grievance procedure, with  
27 binding arbitration at the final stage.

1 SIXTEENTH AFFIRMATIVE DEFENSE

2 PLAINTIFFS BOUND BY TERMS OF CONTRACT

3 96. Plaintiffs' union has entered into a collective bargaining agreement on behalf of  
4 Plaintiffs. That agreement is currently in effect, with a term beginning on July 1, 2006, and ending  
5 on June 30, 2009. Said agreement could have included specific provisions resolving each of the  
6 claims made by Plaintiffs herein and giving Plaintiffs the benefits they seek in this judicial action.  
7 Said agreement does not include any of the provisions sought by Plaintiffs in this lawsuit.  
8 Plaintiffs are bound by the terms of the collective bargaining agreement and may not seek through  
9 judicial action that which their union failed to obtain on their behalf through the collective  
10 bargaining process.

11 SEVENTEENTH AFFIRMATIVE DEFENSE

12 REASONABLE AND GOOD FAITH RELIANCE ON

13 COLLECTIVE BARGAINING AGREEMENT

14 97. Plaintiffs' union has entered into a collective bargaining agreement (MOU) on  
15 behalf of Plaintiffs. That agreement is currently in effect, with a term beginning on July 1, 2006,  
16 and ending on June 30, 2009. Said agreement includes a provision that in effect defines "base  
17 salary" or "base rate of pay" that does not include the longevity stipend or other additions to pay.  
18 See the Master Contract, page 6 (Article 5, Wages). Section 5.1 of the Master Contract then  
19 provides for the "longevity/Performance Stipend" as a percentage increment over the base salary.  
20 Section 7 in Addendum A and Section 7 in Addendum B to that agreement then provide that "The  
21 rate of overtime compensation shall be one and one half (1.5) times the employee's regular base  
22 rate of pay...." Defendant has acted in a good faith reliance on this provision in calculating  
23 overtime pay for Plaintiffs by excluding the longevity stipend and other increments to the base rate  
24 of pay. Prior collective bargaining MOU's between the same parties include similar provisions on  
25 these issues.

1 EIGHTEENTH AFFIRMATIVE DEFENSE

2 NO LEGAL OR EQUITABLE BASIS FOR RELIEF

3 98. The issues relating to pre-shift and post-shift activities are issues that are properly  
4 within the scope of bargaining, they are not susceptible to judicial resolution in that there are no  
5 clear or objective standards that can enable a court to make legally justifiable decisions about the  
6 time needed to complete these activities, the appropriate manner in which they should be  
7 performed, and the appropriate form or amount of compensation, if any, to be paid. In addition,  
8 the financial impacts of giving compensation for these activities need to be considered in light of  
9 an entire compensation package and in light of available funds, and the court is not in a position to  
10 weigh such considerations. Further, this is not a case in which the County is employing inequitable  
11 means to extract work from employees without compensating them, and there is no crying need for  
12 equitable intervention in this case. The court should therefore abstain from resolving these issues  
13 and leave these issues to be resolved by the parties in the collective bargaining process.

14  
15 COUNTERCLAIMS FOR DECLARATORY RELIEF AND  
16 FOR REIMBURSEMENT OF OVERPAYMENT OF WAGES  
17 JURISDICTION

18 99. The court has jurisdiction over the within counterclaims under 28 USC Sec. 1367,  
19 in that the subject matter of these counterclaims is so related to the claims in the original action  
20 filed by Plaintiffs that they form part of the same case or controversy under Article III of the United  
21 States Constitution.

22 PARTIES

23 100. Counterclaimant COUNTY OF MONTEREY ("COUNTY") is a political  
24 subdivision of the State of California. COUNTY is a party to a collective bargaining agreement  
25 with Defendant DEPUTY SHERIFFS' ASSOCIATION OF MONTEREY COUNTY ("DSA").  
26

27 101. Counter-Defendant DSA is an employee organization formed to bargain collectively  
28

1 on behalf of Deputy Sheriffs employed by Counterclaimant COUNTY, including all of the  
2 individual Plaintiffs in the original action filed herein.

3 102. Counter-Defendants DANIEL J. MITCHELL, DAVID A. ALLRED, JOHN C.  
4 BAIRD, JOSEPH ANTHONY CHAFFEE, JOHN Di CARLO, EDWARD DURHAM, DENNIS  
5 ENGLISH, NELSON GARCIA, RUBEN A. GARCIA, DUSTIN HEDBERG, ALFRED  
6 JIMENEZ, TIM KREBS, RICHARD D. MATTHEWS, BRUCE MAUK, WILLIAM D. NAPPER,  
7 SHAWN O'CONNOR, DAVID R. RATTON, KENNETH A. RESOR, ROBERT Q.  
8 RODRIGUEZ, MICHAEL R. SHAPIRO, and GARY WHEELUS, and all others who may join the  
9 original action as Plaintiffs are or have been or claim to have been employees of the Monterey  
10 County Sheriffs' Department within the last three years.

13 COUNTERCLAIM – COUNT ONE

14 MISTAKE AS TO BASE RATE OF PAY

15 103. COUNTY incorporates herein by reference paragraphs 99 through 102, as though  
16 fully set forth herein.

17 104. In the year 2001, COUNTY negotiated a collective bargaining agreement with  
18 Counter-Defendant DSA. The parties memorialized this agreement in a Memorandum of  
19 Understanding (the "2001-06 MOU") which was to be effective for the period July 1, 2001,  
20 through June 30, 2006. DSA entered into this agreement for the benefit of its then current as well  
21 as future members, including all of the Plaintiffs and individual Counter-Defendants in this action.  
22 In paragraph 5.3 of the 2001-06 MOU, the parties agreed that wages set for Plaintiffs would be  
23 calculated from a benchmark wage established by averaging the wages for specified positions in  
24 three city police departments, including the City of Salinas.  
25  
26  
27  
28

1           105.     Subsequently, COUNTY obtained what it thought were the relevant wages from the  
2 three cities, calculated the wages for Plaintiffs based on the figures provided by the cities, and paid  
3 wages to Plaintiffs based on those calculations.  
4

5           106.     Later still, COUNTY learned that the City of Salinas had provided figures that were  
6 incorrectly stated too high, causing the average of the three cities' wages to be incorrectly high.  
7 COUNTY has thus paid wages to the individual Plaintiffs/Counter-Defendants based on the  
8 incorrectly high figures. The mistake was caused by the City of Salinas, COUNTY was unaware  
9 that the initially provided figure was erroneous, and COUNTY was entitled to rely on the figure  
10 provided by Salinas.  
11

12           107.     Some time before or after the COUNTY learned of the mistake made by the City of  
13 Salinas, COUNTY and DSA negotiated a new MOU, for the period July 1, 2006, through June 30,  
14 2009 (the "2006-09 MOU"). In the 2006-09 MOU, the parties continued the wages that were set  
15 incorrectly high under the previous MOU, with percentage increases over the previous wages.  
16 Thus, under the MOU presently in effect, Defendant County has continued to pay wages to  
17 Plaintiffs under the incorrectly high calculations originally made under the 2001-06 MOU.  
18

19           108.     COUNTY has not yet been able to ascertain the amount of the overpayments and  
20 requests leave to amend this Counterclaim when the same is ascertained.  
21

22           109.     COUNTY reasonably relied on the information provided by Salinas and is without  
23 fault in the mistake that was made. COUNTY is entitled to recover the overpayments of wages  
24 from the individual Plaintiffs and Counter-Defendants.

25           110.     COUNTY is entitled to a declaration that wages payable under the current 2006-09  
26 MOU may be corrected to reflect the correct calculation of wages based on the correct benchmark.  
27  
28



COUNTERCLAIM – COUNT TWO

MISTAKE AS TO ACCUMULATING NON-WORKING HOURS FOR OVERTIME

111. COUNTY incorporates herein by reference paragraphs 99 through 102, as though fully set forth herein.

112. The Fair Labor Standards Act, 29 USC Sec. 207, requires that the COUNTY pay overtime wages only for hours worked after the employee has actually worked the maximum number of regular hours.

113. Section 14 of the 2001-06 MOU between the COUNTY and Plaintiffs' union for the period July 1, 2001, through June 30, 2006, similarly required that the COUNTY pay overtime wages only after the employee had actually worked the maximum number of regular hours.

114. The current 2006-09 MOU also requires that the COUNTY pay overtime wages only after the employee has actually worked the maximum number of regular hours.

115. Nevertheless, the COUNTY has in fact, for over four years, paid overtime wages to some or all of Plaintiffs for work performed by Plaintiffs after counting non-working hours (such as time on vacation, sick leave, or comp time) to reach the overtime threshold. COUNTY has not yet been able to ascertain the amount of the overpayments, and requests leave to amend this Counterclaim when those amounts are ascertained.

116. Recently, in the year 2008, COUNTY discovered that Plaintiffs were being paid overtime based on the accumulation of non-working hours. COUNTY has attempted to find out when, how and why these overpayments of overtime began and continued to occur. At this point, COUNTY is informed and believes that this occurred when the COUNTY acquired a new computer program for payroll which included this provision for overtime pay without the COUNTY's knowledge or consent.

1           117. Defendant has thus paid more than the law and the applicable MOU's have required  
2 for overtime. This occurred as a result of a mistake, for which the COUNTY is not at fault, and  
3 COUNTY is therefore entitled to recover any overpayments from the individual Plaintiffs' and  
4 Counter-Defendants.  
5

6           118. Defendant is further entitled to a declaration that the current MOU does not require  
7 the COUNTY to include non-working hours when determining eligibility for overtime pay.  
8

9           **WHEREFORE**, this answering Defendant and Counterclaimant prays for judgment  
10 against Plaintiffs and Counter-Defendants as follows:

11           **ON PLAINTIFFS' COMPLAINT:**

- 12           1. That Plaintiffs take nothing by their complaint.  
13           2. That this answering Defendant be awarded its costs of suit incurred herein.  
14           3. For such other and further relief as the Court deems just, proper, and equitable.  
15

16           **ON COUNTY'S COUNTERCLAIMS:**

- 17           4. For a declaration that wages payable under the current 2006-09 MOU may be  
18 corrected to reflect the correct calculation of wages based on the correct benchmark, with the  
19 amounts of such corrections to be determined according to proof.  
20           5. For an order authorizing COUNTY to obtain reimbursement of the resulting wage  
21 overpayments from the individual Plaintiffs, in amounts according to proof.  
22           6. For a declaration that the current MOU does not require the COUNTY to include  
23 non-working hours when determining eligibility for overtime pay.  
24           7. For an order authorizing COUNTY to obtain reimbursement of the overtime  
25 overpayments from the individual Plaintiffs, in amounts according to proof.  
26  
27  
28

1 8. For such other relief as the court deems just and proper.  
2

3  
4 DATED: March 19, 2008.

Respectfully submitted,

5 CHARLES J. McKEE  
County Counsel

6 By   
7 WILLIAM K. RENTZ  
8 Sr. Deputy County Counsel

9 Attorneys for COUNTY OF MONTEREY  
10 Defendant and Counterclaimant

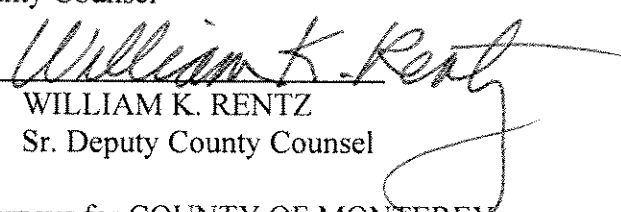
11 **DEMAND FOR JURY TRIAL**

12 Pursuant to FRCivP Rule 38, Defendant and Counterclaimant demands a jury trial on all  
13 issues triable to a jury in this case.  
14

15  
16 DATED: March 19, 2008.

Respectfully submitted,

17 CHARLES J. McKEE  
18 County Counsel

19 By   
20 WILLIAM K. RENTZ  
21 Sr. Deputy County Counsel

22 Attorneys for COUNTY OF MONTEREY  
23 Defendant and Counterclaimant  
24  
25  
26

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